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Nos. 88-854, 88-856 and 88-870

MOTION FILED JUN 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

HENRY G. SPALLONE, *Petitioner*,

—v.—

UNITED STATES OF AMERICA and YONKERS BRANCH-NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*, *Respondents*.

PETER CHEMA, *Petitioner*,

—v.—

UNITED STATES OF AMERICA and YONKERS BRANCH-NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*, *Respondents*.

NICHOLAS LONGO and EDWARD FAGAN, *Petitioners*,

—v.—

UNITED STATES OF AMERICA and YONKERS BRANCH-NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*, *Respondents*.

ON WRITS OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE NEW YORK CIVIL LIBERTIES UNION IN SUPPORT OF RESPONDENTS

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MOTION OF THE AMERICAN CIVIL LIBERTIES UNION AND NEW YORK CIVIL LIBERTIES UNION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The American Civil Liberties Union (ACLU) and New York Civil Liberties Union

(NYCLU) hereby move for leave to file the attached brief amicus curiae, pursuant to Rule 36.3 of the Rules of this Court. The reason for the motion is that petitioner Spallone has refused to consent to the filing of this brief. Consents have been obtained from petitioners Chema, Fagan and Longo, as well as from respondents NAACP and the United States.*/

The ACLU is a nationwide, nonprofit, nonpartisan organization of over 250,000 members dedicated to defending the principles embodied in the Constitution. The NYCLU is one of its statewide affiliates. Both organizations have appeared before this Court on numerous occasions.

The issues in this case involve

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*/ Copies of those consents have been lodged with the Clerk.

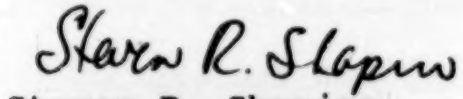
matters of longstanding concern to the ACLU. Throughout its 70 year existence, the ACLU has continuously looked to the federal courts as a forum for the vindication of constitutional rights. The vitality of that forum depends in large measure on the power of the courts to enforce their decrees. Any limitation on that power will necessarily affect the organizational work of the ACLU.

To avoid burdening the Court with repetitious argument, the ACLU has not addressed each of the issues raised by petitioners. Instead, we have focused our attention on the First Amendment claim set forth primarily by petitioner Chema. (Brief at 33-38).

We respectfully move, therefore, for leave to file the attached brief amicus

curiae in order to present the Court with our views in this important matter.

Respectfully submitted,



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Dated: June 8, 1989

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INTEREST OF AMICI

The interest of amici is set forth in the motion attached to this brief.

STATEMENT OF THE CASE

This case has become an important symbol in the ongoing effort to eliminate the scourge of racial discrimination from American society. It was brought in the north, not the south. It was jointly litigated by the Department of Justice and local civil rights leaders. It resulted in the first judgment ever holding an American city guilty of both housing and school discrimination in the same lawsuit. And it has, unfortunately, led to a conflict between the district court and city officials that threatens the ability of district courts everywhere to enforce their constitutional decrees.

The contempt orders at issue on this appeal can only be understood in their historical context. The original complaint in this case was filed in 1980. In late 1985 -- following a ninety day trial -- the district court concluded that the City of Yonkers had violated the Fourteenth Amendment by deliberately placing nearly all of its public and subsidized housing in a largely black ghetto located in the City's southwest corner. See United States v. Yonkers Bd. of Education, 624 F.Supp. 1276, 1369-76 (S.D.N.Y. 1985).1/

One year later, the district court entered a Housing Remedy Order, which required the City to build public and subsidized housing outside of southwest

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1/ In the same opinion, the district court also found that the City of Yonkers and its Board of Education had intentionally maintained a segregated school system. Id. at 1526-45.

Yonkers. See United States v. Yonkers Bd. of Education, 635 F.Supp. 1577 (S.D.N.Y. 1986), aff'd, 837 F.2d 1181 (2d Cir. 1987), cert. denied, 108 S.Ct. 2821 (1988). The City's response to that order was to engage in massive and persistent noncompliance. As fairly summarized by the district court:

> [T]he attitude of the representatives of Yonkers has been to do nothing affirmative, to place the entire onus of implementation on the Court, and to engage in obstructive and dilatory tactics. To date, there have been untoward delays in implementing the Housing Remedy Order some 18 months after its promulgation. Only the threat of bankrupting fines has produced any action by the City.

United States v. Yonkers Bd. of Education, 675 F.Supp. 1413, 1414 (S.D.N.Y. 1987).

In January 1988, the City finally signed a consent decree that set forth specific procedures for implementing its obligations under the Housing Remedy Order. (J.A.216-24). Of particular relevance

here, the City agreed to enact specific legislation within 90 days -- including zoning changes, tax abatements and density bonuses -- intended to encourage the construction of subsidized housing at designated sites chosen by the parties and approved by the court. (J.A.222). The City also agreed to work "diligently" with respondents in an effort to resolve any "subsidiary issues" no later than February 15, 1988. Id.

Those deadlines came and went, like so many earlier ones, without any action. Indeed, the only proposal by the City was an offer to return nearly $30 million in federal funds if the City were relieved of its duty to build public housing in white neighborhoods. 856 F.2d at 449. When the district court rejected that proposal, the City dug in its heels in two ways. First,

it refused to enact the legislation needed to develop subsidized housing, despite its agreement to do so in a consent decree. Second, it refused to continue negotiations on any plan for public housing, again despite its agreement to do so.

Faced with this recalcitrance, the district court issued a so-called Long Term Plan Order on June 13, 1988. Among other things, it contained the details of an Affordable Housing Ordinance that was based on a draft prepared by the City before it withdrew from negotiations. The district court then asked the City Council to fulfill its constitutional obligations by adopting the provisions of the Long Term Plan Order. The City Council responded by defeating a resolution that merely called on the City to obey its own consent decree and the remedial orders issued by the dis-

trict court. (J.A.345-46). On July 11, 1988, the City formally informed the district court that it would not comply with the consent decree and, through counsel, suggested that the court "enact" the necessary legislation itself.

Twice before the district court had adopted this approach and, through its conciliatory efforts, had obtained almost $20 million in federal housing funds for the City of Yonkers. (J.A.174).[2/] By the summer of 1988, however, it was clear that these released funds had not encouraged the City of Yonkers to produce the integrated housing required by the court's remedial order and the parties' consent decree.

Accordingly, on July 26, 1988, the district court entered an order directing

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2/ See also Brief of Petitioner Chema (Ch.Br.) at 4.

the City Council to comply with the consent decree and enact the Affordable Housing Ordinance on its own by August 1st. In addition, the court tentatively scheduled a contempt hearing for August 2nd in the event that the specified legislation was not enacted. This order to show cause was served on both the City and the individual members of the City Council, all of whom are officers of the City under state law and thereby bound by each of the court's previous decrees.

On August 1, 1988, the City Council voted 4-3 against adopting the Affordable Housing Ordinance. The City and the four holdout votes on the City Council -- petitioners Spallone, Longo, Fagan and Chema -- were then held in contempt on August 2nd and 4th. In imposing a series

of escalating fines, the district court explained:

> [T]here does have to come a moment of truth, a moment of reckoning, a moment when the City of Yonkers seeks not to become the national symbol of defiance to civil rights and to heap shame upon shame upon itself, but to recognize its obligation to conform to the laws of the land and not step by step, order by order, but in the way which any responsible community concerned about the welfare of its citizens functions. That is not going to be accomplished by this court adopting the ordinance.

United States v. City of Yonkers, 856 F.2d 444, 451 (2d Cir. 1988)(quoting district court).[3/]

On August 26, 1988, the Second Circuit upheld the district court's contempt order

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3/ Before entering its July 26th order, the district court had also considered the creation of an Affordable Housing Commission to function in lieu of the City Council on housing matters. The City opposed the idea at the time on the ground that it would divest the City Council of its "important legislative functions." (J.A.393).

and fines. Id.[4/] On September 1st, this Court stayed the sanctions against the Council members, but denied the City's motion for a stay. Spallone v. United States, 109 S.Ct. 14 (1988). On September 9, 1988, the City Council enacted the Affordable Housing Ordinance -- three years after the original liability finding, two years after the district court issued its Housing Remedy Order, eight months after a consent decree was signed, and five months after the deadline contained in the consent decree had come and gone.

This Court has now granted certiorari to consider whether the district court abused its discretion by holding four members of the Yonkers City Council in con-

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4/ On appeal, the escalating fines against the City were capped at $1 million per day. 856 F.2d at 460.

tempt for their refusal to adopt an Affordable Housing Ordinance that was an integral part of an agreed-upon effort to remedy substantial and longstanding constitutional violations by the City of Yonkers. 109 S.Ct. 1337 (1989).[5/]

SUMMARY OF ARGUMENT

Nearly a decade after this litigation began, most of the issues have finally been resolved. Petitioners no longer challenge the district court's finding that the City of Yonkers deliberately segregated its public schools and housing for a period of forty years. They no longer challenge (in court) the plan to remedy those violations through school integration and scatter site

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5/ The City's petition for certiorari was denied the same day without comment or dissent. City of Yonkers v. United States, 109 S.Ct. 1339 (1989).

housing. They no longer challenge the district court's authority to enforce its decrees. Indeed, at this stage of the proceedings they seem quite willing to accept the district court's authority to hold the City of Yonkers in contempt. Finally, petitioners do not seriously deny that the remedial efforts of the district court have been delayed and obstructed at nearly every turn by the resistance of Yonkers officials and, furthermore, that this resistance was most often centered in the City Council.

Petitioners nevertheless argue that the district court abused its discretion when it ordered the members of the City Council to enact implementing legislation that the Council had already accepted in principle by approving a consent decree in January 1988. Petitioners rest their objection on two basic grounds. First,

they contend that legislators have an inalienable right under the First Amendment to vote their own conscience, even if the effect of their vote is to renege on a prior agreement by the legislative body in which they serve, and to obstruct a court remedy designed to correct past constitutional wrongs.[6/] Second, petitioners claim that their actions in this case, no matter how contumacious, are cloaked by an absolute legislative immunity and thus cannot be subject to any judicial sanction. Amici believe that neither argument has merit. This brief, however, addresses only the First Amendment claim.

That claim is not entirely without substance. By definition, voting is a

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6/ This argument is primarily raised by petitioner Chema. Ch.Br. at 33-38. It was also discussed by the Second Circuit in its decision below. 856 F.2d at 457.

political statement, whether done in the secrecy of the voting booth or the public glare of a legislative debate. We see no reason to doubt, for example, that all four of the petitioning councilmen sincerely disagreed with the district court when they voted not to adopt an Affordable Housing Ordinance. We cannot agree, therefore, that the First Amendment is irrelevant to this case.

At the same time, the vote of a legislator is more than a private act of conscience. It is also an official act with official consequences. Here, those consequences were both clear and intended. By voting against the Affordable Housing Ordinance, petitioners were hoping to block its implementation. They were also voting to impede vindication of plaintiffs' constitutional rights and to continue the

politics of racial polarization that have marred Yonkers' government at least since World War II. In effect, petitioners had placed themselves in the schoolhouse door and dared the district court to respond.

Confronted by this act of resistance, the district court had only three practical alternatives. It could blink first, and thereby allow a constitutional violator to dictate the scope of constitutional relief. It could disregard the recalcitrance of Yonkers' elected government by either acting in its stead or creating another body to do so. Or, it could use its equitable powers to insist that the government of Yonkers fulfill the constitutional responsibility it owes to each of its citizens.

The first option is obviously no option at all. As this Court has consistently recognized, the need to eradicate

officially sanctioned racial discrimination represents a state interest of the highest order. Here, that interest is heightened still further by the unprecedented finding of dual discrimination in both housing and education.

That leaves two options: either going around or through the Yonkers City Council. In choosing between these alternatives, we agree with petitioners that the existence of competing constitutional interests is relevant to the selection of an appropriate judicial remedy. We disagree, however, with petitioners' view that the district court's actions were incompatible with that general principle of judicial restraint.

Petitioners' intransigence had placed the district court in a position where any remedy it chose had obvious drawbacks. Creating an Affordable Housing Commission

to operate outside the normal channels of government, as petitioners now propose, is hardly a minor step. Indeed, the City strenuously objected when the possibility was even raised by the district court.

The district court's experience with adopting legislation for the City Council was scarcely more encouraging. Twice before the City Council had refused to ratify a "Housing Assistance Plan" required by the federal government as a condition of funding and the district court had acted in its stead. Although the district court's action had relieved the City Council of the political pressure it might have otherwise felt if federal funds were lost, it did not succeed in building any homes or in solving the underlying constitutional problem.

To be sure, the decision requiring the City Council to accept its constitutional responsibility by enacting an Affordable Housing Ordinance was strong judicial medicine. On the other hand, it had the unique benefit of forcing the City Council to play an active role in redressing the constitutional violations that its past actions had helped to create.

With the advantage of hindsight, petitioners argue that the same result could have been achieved by fining the City without fining the individual Council members. That may or may not be true. But hindsight cannot be the standard for judging the propriety of remedial relief in a constitutional case. The simple fact is that the district judge had lived with this case for almost ten years. He knew what he had tried and he knew what had not worked. His

decision is entitled to deference from this Court.

Obviously, the authority of district courts is not unlimited, even at the remedial stages of constitutional litigation. Under the circumstances of this case, however, it was entirely reasonable for the district court to conclude that the goal of integrated housing would never be achieved in Yonkers unless the City itself began to take some responsibility for its implementation. Likewise, it was reasonable for the district court to focus its attention on the City Council, which had created the roadblock to constitutional relief and which served as the center of local opposition.

Amici do not minimize the significance of the district court order. However, we are persuaded that its uniqueness is prima-

rily due to the unique circumstances of this case. Those circumstances will become less unique, and district courts less able to act as the guarantor of constitutional rights, if the order below is reversed.

ARGUMENT

PETITIONERS' INTEREST IN VOTING AGAINST AN AFFORDABLE HOUSING ORDINANCE, EVEN IF VIEWED IN FIRST AMENDMENT TERMS, IS OUTWEIGHED IN THIS CASE BY THE DISTRICT COURT'S INTEREST IN OBTAINING MEANINGFUL ENFORCEMENT OF ITS CONSTITUTIONAL ORDERS

This case can and should be decided on its facts. Given the history of official resistance revealed by this record, it is unnecessary to decide whether the act of legislative voting is <u>ever</u> protected by the First Amendment. It is sufficient to note that the judicial enforcement of constitutional decrees has always been recognized as a compelling governmental interest. On

a different set of facts, the balance might well be different.[7] This case, however, surely presents any First Amendment claim in its least sympathetic light.

A. Petitioners' First Amendment Claim Is An Uncertain One

It is impossible to quarrel with the proposition that petitioners' vote against the Affordable Housing Ordinance represented an expression of their political views. As such, it is entitled to some First Amendment protection, regardless of whether the process of casting a vote in a

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[7] For example, a federal district court has recently held that Congress could not compel members of the D.C. City Council to vote for an amendment to their local anti-discrimination law on pain of losing federal funding. See Clarke v. United States, 705 F.Supp. 605 (D.D.C. 1988), appeal pending, No. 88-5439 (D.C.Cir.). Unlike the present case, Clarke does not present any clash between a legislator's First Amendment rights and a court's constitutional decree. Nevertheless, it highlights the variety of settings in which related claims may arise.

legislative chamber is characterized as speech or action. In either event, it seems undeniable that petitioners intended to "convey a particularized message" by their defiance of the district court order. Spence v. Washington, 418 U.S. 405, 411 (1974). Moreover, it seems equally clear that "in the surrounding circumstances, the likelihood was great that the message would be understood by those who viewed it." Id.[8/] Certainly, it came through loud and clear to the district judge.

At the same time, petitioners' effort to analogize the vote of a legislator to the vote of a private individual in the voting booth obscures important differences between the two situations. A private

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8/ See also Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969); Brown v. Louisiana, 383 U.S. 131 (1966); Stromberg v. California, 283 U.S. 359 (1931).

citizen votes to elect representatives. Once elected, those representatives are the government and their decisions when acting in that capacity have always been subject to constitutional scrutiny in a variety of ways.

This case perfectly illustrates the practical meaning of that distinction. Many residents of Yonkers were clearly upset by the terms of the consent decree. As private citizens, however, they had no capacity to block its implementation by refusing to enact the Affordable Housing Ordinance. Petitioners, by contrast, possessed that authority by virtue of their office and exercised it in this case to impede the vindication of important constitutional rights. Their refusal to adopt the Affordable Housing Ordinance was, therefore, more than an act of private

conscience. It was an official act with official consequences that petitioners fully understood and exploited.

Throughout their briefs, petitioners try to distinguish between their acts as individual legislators and the acts of the City Council as a corporate body. That distinction may have some relevance in considering the appropriateness of particular remedies. It has no relevance in determining the scope of petitioners' First Amendment interest. The City Council can only act through its individual members. Thus, when casting a vote against the Affordable Housing Ordinance, petitioners were clearly acting in their official capacities and as representatives of the Yonkers City government.

The question of whether and to what extent the First Amendment applies to offi-

cial "government speech" is one of the more vexing problems of modern First Amendment law. See generally, M. Yudof, When Government Speaks: Politics, Law, and Government Expression in America (1983); T. Emerson, The System of Freedom of Expression 697-716 (1970). It is essential, therefore, to be as precise as possible about the exact nature of any claimed abridgement.

Here, petitioners have plainly overstated their claim in an effort to fit within the contours of traditional First Amendment doctrine. In particular, petitioners' reliance on Bond v. Floyd, 385 U.S. 116 (1966), is clearly misplaced.9/

9/ Ch.Br. at 33-34. Petitioners also contend that the district court order directing them to vote for the Affordable Housing Ordinance violated the "protected relationship between a legislator and his constituents." Id. at 34. In support of that claim, petitioners cite Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986), and a series of other political association cases. The (continued...)

The issue in Bond was whether the Georgia Legislature could exclude Julian Bond from assuming his legislative seat on the theory that his antiwar statements disqualified him from taking the oath of office. It was in that context that this Court wrote:

> [W]hile the State has an interest in requiring its legislators to swear to a belief in constitutional processes of government, surely the oath gives it no interest in limiting its legislators' capacity to discuss their views of local or national policy.

385 U.S. at 135-36 (footnote omitted).

9/ (...continued)
right to political association, however, does not include collective action designed to interfere with the exercise of someone else's constitutional rights. See, e.g., 42 U.S.C. §1985. Indeed, petitioners' argument would prevent the judiciary from ever declaring a law unconstitutional without considering the associational rights of its supporters. This Court has never embraced such a notion. Put in slightly different terms, petitioners are asserting a majoritarian right to overrule the constitutional decision of an Article III court. That proposition is irreconciliable with the doctrine of judicial review.

Nothing in Bond (or any other case that amici have found) sheds any light on whether legislative votes are protected by the First Amendment and, if so, how that right should be reconciled with the duty of the courts to enforce their constitutional decrees. Conversely, nothing in the challenged district court order limits petitioners' ability to discuss any subject they choose, including the controversy surrounding this lawsuit. To the contrary, petitioners can and have criticized the consent decree, the Affordable Housing Ordinance, and the district court's handling of this case to their hearts' content.

If Bond has any relevance to these proceedings, it is contained in this Court's acknowledgement that even legislators can be asked "to swear to a belief in

constitutional processes of government." 385 U.S. at 135. An oath of that sort obviously has First Amendment overtones. See Wooley v. Maynard, 430 U.S. 705 (1977); West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943). Nevertheless, Bond implicitly recognizes that legislators have no First Amendment right to impede constitutional government when acting in their official capacity.10/

Amici do not pretend that the First Amendment issues in this case are easy to

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10/ In a somewhat analogous circumstance, employers found guilty of unfair labor practices by the NLRB are routinely required to post the agency's remedial order. From the employer's perspective, this could easily be construed as a requirement of compelled speech. Cf. Pacific Gas & Elec. Co. v. Public Utilities Commission of California, 475 U.S. 1 (1986). Yet, such posting requirements are generally considered an appropriate means of safeguarding the important statutory rights the NLRB was created to protect. In this case, of course, we are dealing with constitutional rights and an Article III court.

unravel. This Court has recently grappled with the complications caused by a claim of mixed motive in discrimination cases. See Price Waterhouse v. Hopkins, 57 U.S.L.W. 4469 (May 1, 1989). Here, the complication arises from the fact that petitioners' vote against the Affordable Housing Ordinance was both a statement of individual conscience and an act of official defiance to the vindication of constitutional rights.

Fortunately, the legal conundrum that might possibly exist on another set of facts largely disappears in the record of this case. First, there is the existence of a consent decree. By voting for that consent decree in January 1988, petitioners Fagan and Longo committed themselves to enacting some version of an Affordable Housing Ordinance. There is surely no impediment to holding them to the terms of

their own bargain. Cf. United States v. Swift & Co., 286 U.S. 106, 119 (1932)(proof of "grievous wrong" necessary to modify terms of a consent decree).

Unlike Fagan and Longo, petitioners Chema and Spallone voted against the consent decree and resist any notion that they are bound by its provisions. That proposition, however, is far from self-evident. As a general principle, it is surely reasonable to hold that the members of a democratic body are bound by the judgments of its majority. For example, no one would think for a moment that legislators were free to disobey a lawfully enacted statute on the ground that they did not vote for it. It is not intuitively obvious why consent decrees should be treated any differently. In fact, once signed by the court, a consent decree is governed by

traditional equitable rules that extend its effect to a party's officers and agents. E.g., Rule 65(d), Fed.R.Civ.P.

Beyond the issue of the consent decree, moreover, the district court's compelling interest in redressing a proven constitutional violation largely obviates the need to dissect the precise nature of petitioners' First Amendment rights. That important task can and should await another day.

B. The Enforcement Of Federal Court Orders In Civil Rights Cases Is A Compelling State Interest

It is impossible to read the record in this case without appreciating the practical obstacles faced by the district court in securing compliance with its constitutional judgments. The purpose of the order that petitioners now challenge was to achieve that goal. Even petitioners do not

seriously argue that it was designed to stifle criticism of the district court or its remedial approach.

Relying on that fact, the Second Circuit quickly dismissed petitioners' First Amendment claim with a citation to United States v. O'Brien, 391 U.S. 367 (1968).[11/] Often, of course, the choice of a standard determines the outcome. Here, that dispute is largely academic for the simple reason that the district court order is clearly supported by two state interests of the highest magnitude. The interest in undoing the effects of de jure segregation has been deemed compelling at least since Brown v. Board of Education, 347 U.S. 483 (1954). The interest in enforcing lawful court orders is inherent in the notion of judi-

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11/ See 856 F.2d at 457.

cial review first set forth in Marbury v. Madison, 5 U.S. 137 (1803).

These interests often coalesce in civil rights cases when local resistance to judicial decrees is apt to be particularly strong.12/ Nor is that surprising. Judicial intervention is unnecessary where the political will exists to remedy prior discrimination. Where that political will is lacking, a declaration of rights means very little without injunctive relief. And injunctive relief is only as potent as the threat of enforcement that stands behind it.

As Chief Justice Marshall wrote almost two centuries ago:

12/ See Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 14 (1971)("The failure of local authorities to meet their constitutional obligations aggravated the massive problem of converting from the state-enforced discrimination of racially separate school systems").

> If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery, and the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals.

United States v. Peters, 9 U.S. 115, 136 (1809). See also Cooper v. Aaron, 358 U.S. 1, 18 (1958).

One hundred and fifty years later, this Court made a similar point in ordering desegregation of the Topeka school system. After declaring in Brown I that "[s]eparate educational facilities are inherently unequal," 347 U.S. at 495, this Court held in Brown II, 349 U.S. 294, 300 (1955), that "the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them." That statement of constitutional supremacy is equally pertinent in Yonkers today. We

therefore share the view of the district court, which summarized its predicament by stating: "I've said on many occasions that if federal civil rights remedial orders can be defeated by local political hostility we no longer live in a government of law." (J.A.394).

C. The District Court Remedy Was A Reasonable Choice Among Available Alternatives And Should Be Upheld

The heart of petitioners' argument is that the district court order requiring them to vote for the Affordable Housing Ordinance, and then fining them when they did not, was an abuse of discretion because it did not represent the least restrictive means available to the district court for enforcing its decree. The record in this case does not support that contention.

It is important to remember that the City Council had already agreed to enact an

Affordable Housing Ordinance when it approved the consent decree. In a very real sense, therefore, the remedy that petitioners now challenge was not chosen by the district court. Rather, the district court was merely enforcing a remedy that the City Council had chosen itself.13/

Furthermore, even assuming that the "least restrictive means" test applies in this context, none of the alternatives proposed by petitioners is clearly less drastic than the actual order issued by the district court. Under those circumstances, the decision of the district court is surely entitled to considerable deference. Any other approach would impose an ill-advised straitjacket on the ability of

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13/ See pp.3-4, infra.

district courts to enforce their constitutional judgments.14/

As this Court has frequently held: "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. at 15. See also Milliken v. Bradley, 433

14/ The decision to fine petitioners for their willful noncompliance with the district court order can hardly be described as an abuse of discretion. Once civil contempt is established, a court's choice of coercive sanctions is rarely disturbed. See, e.g., Sizzler Family Steak Houses v. Western Sizzler Steak, 793 F.2d 1529, 1536 n.8 (11th Cir. 1986); N.A. Sales Co. v. Chapman, 736 F.2d 854, 857 (2d Cir. 1984); Hubbard v. Fleet Mfg., 810 F.2d 778, 782 (8th Cir. 1987); G.& C. Merriam v. Webster Dictionary Co., 639 F.2d 29 (1st Cir. 1980). In truth, of course, petitioners do not object to the form of the sanction but to any sanction at all. Assuming the validity of the underlying order, however, it is difficult to imagine a rule of law that requires the district court to ignore an act of willful contempt.

U.S. 267 (1977); Griffin v. County School Board, 377 U.S. 218 (1964).

The district court undoubtedly used that flexibility in this case. But it did so in an entirely reasonable manner. In particular, the district court recognized, as petitioners do not, that there were advantages and disadvantages to any way of dealing with petitioners' contumacious conduct.

Petitioners contend that the district court could have enacted an Affordable Housing Ordinance on its own without insisting on any further votes by the City Council. We agree as a matter of sheer judicial power. However, we also believe that the utility of any proposed remedy can only be judged in light of the goal it is

designed to achieve.[15/] In short, the end and the means are truly interrelated. See City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 808 (1984).

Here, the objective of the district court was not to enact an Affordable Housing Ordinance for its own sake. The objective of the district court was to remedy the segregated housing patterns that the City of Yonkers had intentionally fostered for forty years. Given that long history of unconstitutional behavior, the district court can hardly be faulted for its conclusion that the chance of obtaining meaningful relief would be significantly enhanced with the City's cooperation. Perhaps more to the point, petitioners' unwillingness to

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15/ As previously noted, the district court had followed the route that petitioners now propose on two prior occasions without notable success. See p.6, infra.

comply with the consent decree threatened to complicate every remedial step in what all parties understood would be a multiyear effort.[16] If nothing else, it encouraged an attitude throughout the City of Yonkers that desegregation could be delayed or avoided by engaging the district court in a war of attrition.

Petitioners also contend that the district court could and should have created an Affordable Housing Commission with power to adopt the Affordable Housing Ordinance and assure its implementation.[17]

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[16] City officials charged with implementing the Affordable Housing Ordinance would have been left in an impossible quandary. Their employers would be ordering them to take one action. The court would be ordering them to take another. At the very least, this political gridlock could be expected to produce predictable delays if not outright obstructionism.

[17] It is fair to describe any remedy that supersedes the City Council as a "limited receivership."

Suffice it to say that petitioners' view of this plan as a less restrictive alternative was not shared by the City of Yonkers when it was originally suggested by the district court. (J.A.393).

The reasons are plain. The development of desegregated housing in Yonkers will require an enormous number of sensitive decisions over a long period of time. Some of those decisions, such as siting, are clearly related to the central issues of this lawsuit and thus an appropriate concern of the district court. It does not follow, however, that the district court has either the time or expertise to oversee numerous other decisions, including: Who should design the homes? Who should build them? And who should live in them? To place these decisions in the hands of a parallel bureaucracy operating under judi-

cial supervision may (or may not) be more efficient but it is hardly less intrusive. Certainly, the district court was entitled to consider the drain on its own resources before imposing a remedy in this case.[18/]

Finally, petitioners contend that the district court could have achieved the same results by holding the City in contempt without the necessity of also holding the Council members in contempt. Indeed, petitioners argue this is precisely what happened. The Affordable Housing Ordinance

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18/ Once again, amici have no doubt that the district court possesses the authority to create an Affordable Housing Commission pursuant to Rule 70, Fed.R.Civ.P. But the existence of authority is not the same as using it. When the issue was discussed in the district court, all parties recognized that the appointment of an Affordable Housing Commision would be an extraordinary step. Petitioners now challenge that consensus by comparing the Commission to a special master. The appointment of special masters, however, is governed by an entirely different provision of the federal rules. See Rule 53, Fed.R.Civ.P.

was ultimately adopted when the mounting fines against the City became impossible to bear even though the individual fines against petitioners had been stayed by this Court.19/

The problem with this argument is that it only works with the benefit of hindsight. At the time the contempt orders were issued, the district court had no way of knowing when or if the council members would bow to the pressure created by bankrupting fines against the City. To the contrary, it was entirely conceivable that the Council would engage the district court in a game of "chicken," with each side seeking to blame the other for the deterio-

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19/ The ordinance was adopted by a final vote of 5-2, with petitioners Chema and Spallone continuing to dissent. Under the terms of the district court order, their negative votes were no longer deemed contumacious once the ordinance was enacted. (J.A. 398-99).

ration in municipal services.[20] Nothing in logic or law compels the court to engage in such games in order to achieve compliance with a valid order to remedy the intentional violation of constitutional rights.

Amici recognize, as did the district court, that an order requiring individual legislators to vote in favor of a specific legislative proposal has its own drawbacks. See Point IA, infra. But we also recognize the pervasiveness of the underlying discrimination in this case and the importance of enforcing the court's constitutional decrees. Given the primacy of that goal, and the lack of any obviously preferable

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[20] As fines increased, the possibility of municipal bankruptcy was entirely real and, with it, the prospect of a state takeover. That outcome could not be described as less intrusive by anyone's definition.

alternative, amici do not believe that the district court's order was an abuse of discretion on the facts of this case.

CONCLUSION

For the reasons stated herein, the judgment below should be affirmed.

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